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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 963

GEORGE PEKAR, JOSEPH ROZELL, EDWARD PATTERSON, JOHN AUDIA, MELVIN GOWER and ROBERT SCHMANTOWSKY, individually and in behalf of all other employees of Goebel Brewing Company who worked at Plant No. 3 of said Company prior to the closing thereof,

Petitioners,

vs.

LOCAL UNION No. 181 of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO,

and

INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioners, George Pekar, Joseph Rozell, Edward Patterson, John Audia, Melvin Gower and Robert Schmantowsky, individually and in behalf of other named Plaintiffs, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on December 31, 1962.

OPINIONS BELOW

The judgment of the district court (34a-35a) granting plaintiffs' prayer for relief is reported in 195 F. Supp. 938 (1961). The opinion of the Court of Appeals is reported in 311 F. 2d 628 (1962), and a copy is appended hereto (Appendix A, 1a).

JURISDICTION

The judgment of the Court of Appeals is dated December 31, 1962, and was entered on the same date. The jurisdiction of this court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. In a situation in which one group of employees in the bargaining unit contends the collective bargaining contract provides for layoff on the basis of company seniority, and another group claims plant seniority controls on layoffs, and the agreement further provides that "all differences or misunderstandings which may arise shall be settled between the Employer and the Local Union by regular grievance procedure" which ends in binding arbitration, does a union breach its duty of representation by refusing to submit the dispute to the grievance procedure by filing a grievance in behalf of the group which claims it was wrongfully laid off?

2. Does the answer to the above question depend upon (a) whether the collective bargaining agreement is ambiguous; or (b) is this issue to be determined exclusively by the grievance process and arbitration, in the first instance?

3. If the answer to 2.(a) is "yes", must the federal courts apply to ordinary rules of construction of contracts in cases involving collective bargaining agreements?

STATUTES INVOLVED

Labor-Management Relations Act of 1947, as amended:

"Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. * * *

* * *

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *."

61 Stat. 140, 143, 29 U. S. C. (Supp. V) Secs. 157, 159 (a).

STATEMENT

Jurisdiction of the trial court was predicated on the existence of a federal question arising under 28 U. S. C. A. Sec. 2201, as amended, being 68 Stat. 890; and 29 U. S. C. A. Sec. 157 et seq., 61 Stat. 140, et seq.

This is a class action brought to compel a union to discharge its duty of representation by presenting and prosecuting through the grievance and arbitration procedure a grievance to enforce the seniority rights of persons employed as bottlers by Goebel Brewing Company in its Plant No. 3, at Detroit, Michigan, prior to October, 1958; and for damages for failure to do so.

There is no dispute as to the facts. From 1948 to 1958 Goebel operated two plants in Detroit. On May 22, 1958 a collective bargaining agreement was entered into between Locals 3 (with jurisdiction over brewers), 38 (with jurisdiction over warehousing and delivery) and 181 (with jurisdiction over bottling processes) of the International

Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, and all breweries in the Detroit area, of which Goebel was one. Contracts with all three Locals were contained in one printed booklet — wherein some sections were common to all three Locals and others applied specifically to one or another of the Locals. For example, each Local had its own provisions relating to seniority rights and wages, but the insurance, retirement plan, and grievance and arbitration clauses were common to all. The seniority provisions relating to bottlers were:

ARTICLE IV

BOTTLING DEPARTMENT

"* * * Section 4. (a) All employees shall be considered as probationary employees during their first thirty (30) working days of employment which days need not be consecutive. Probationary employees shall be subject to layoff or discharge at the discretion of the Employer. When the probationary period is completed employees shall acquire seniority as of the beginning of said period of thirty (30) working days and shall then become temporary employees. All employees with twelve (12) months or more seniority shall be regular employees.

"* * * (b) Seniority shall be strictly adhered to in laying off and rehiring but according to the following regulations. No man shall lose his seniority due to sickness or injury.

(1) All Local Officers shall hold top seniority during their term of office. Shop Stewards shall hold top seniority on their respective shift only.

(2) All probationary employees shall be laid off first.

(3) All temporary employees shall then be laid off in accordance with their seniority.

(4) When a forty (40) hour week cannot be given to all regular employees and a further layoff

is necessary, then the regular employees shall be laid off according to their seniority, the last regular employee hired shall be the first to be laid off and so on in that order. This layoff to continue until a single eight (8) hour unit operation is reached. In such event, if there is any work available on days when bottling operations are suspended, the men with the highest seniority shall be called in.

(5) There shall be a seniority list for Stroh Checkers and a seniority list of Goebel Checkers at Plant No. 1 and a list at Plant No. 3 that shall be strictly used to determine layoffs and recalls in the Checking Department only.

"(c) When employees are recalled, the last man laid off shall be the first to be rehired, and so on, in reverse order to that in which they were laid off in accordance with their seniority. This provision shall not apply to probationary employees.

"(d) A list of employees, arranged in the order of their seniority, shall be revised and posted March 1st and September 1st of each year. A copy of the seniority list shall be furnished the Local Union.

"* * * Section 11. Employees shall have preference of shift in accordance with seniority (length of service with the Employer) subject to the following conditions: * * *" (305a-307a).

Plaintiffs' grievance arises out of the fact that, when it closed Plant No. 3, Goebel did not lay off in the order of seniority but, on the contrary, laid off all bottlers who had been working in that plant while retaining bottlers with less seniority who had been working at Plant No. 1. In short, the plaintiffs contended that the contract provides for company, not plant, seniority and the company refused to recognize this. They attempted to file a grievance with the union but the Local refused to accept it, claiming that the contract was modified by a custom and practice of treating the two Goebel plants as separate companies for seniority purposes. They appealed to the In-

ternational Union and the International refused to overrule the Local. Plaintiffs then brought suit requesting, among other things, that the court render a declaratory judgment as to whether the existing collective bargaining agreement governed the situation created by the closing of the plant or if the union was under a duty to negotiate a new agreement because of the changed situation; that if the contract did apply, what plaintiffs' rights were under it; that plaintiffs be given "specific performance of the duty of defendants, and each of them, to enforce and protect their seniority rights under the existing agreement, including, but not limited to, the invocation of the processes of negotiation, arbitration, economic force, or available judicial remedies"; and damages (7a-8a).

The pertinent provisions relating to grievance processing and arbitration were:

ARTICLE VIII

ARBITRATION AND TERMINATION

"* * * Section 1. (a) All differences or misunderstandings which may arise shall be settled between the Employer and the Local Union by regular grievance procedure, and if no adjustment satisfactory to both parties can be reached in this way, then the matter shall be settled by a Board of Arbitration constituted as hereinafter provided.

"The orderly settlement of differences and misunderstandings including arbitration thereof, shall not be interfered with, and there shall be no strike, lockout, or other interruption of or interference with scheduled operations before or during arbitration.

"A Board of Arbitration shall be constituted in the following manner: Two arbitrators shall be selected by the Employer and two by the Local Union. These four arbitrators shall be selected from the brewing industry and from companies other than where the alleged breach or violation has occurred. In case they cannot agree, these four members shall select a fifth member,

who shall be a disinterested party, and a majority decision rendered in writing shall then be binding upon both parties. * * *

"(e) It is understood and agreed that questions involving changes in the terms and provisions of this Agreement shall not be subject to arbitration hereunder and the Board of Arbitration shall have no power to add to, subtract from or modify this agreement or change any rates of pay or wages.

"* * * Section 4. No verbal understanding or representations of any nature that would change the meaning of any section of this Agreement will be recognized or considered valid and no Union representative or Employer representative shall have the authority to change any provision of this Agreement". (307a-309a).

The trial court held that the contract was not ambiguous; therefore, evidence of custom and practice could not be considered, and ordered the defendants to proceed with the enforcement of plaintiffs' seniority rights. No evidence was taken on the question of damages pending the outcome of an appeal. The Court of Appeals for the Sixth Circuit held that the contract was ambiguous in its opinion but, even if it was not ambiguous, the defendants had not breached their duty of fair representation, and dismissed the action (Appendix A).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the Sixth Circuit erred:

On the first question —

1. In overruling the judgment of the District Court that the dispute should be submitted to the grievance and arbitration procedure by the union.

On the second question —

2. In deciding the merits of the dispute and holding that the contract was ambiguous; and in further holding that, even if the contract is not ambiguous, petitioners are

not entitled to have the grievance and arbitration procedure invoked in their behalf.

On the third qeustion —

3. In overruling the conclusions of law of the District Court.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court.
2. The Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this court.
3. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.
4. The decision of the Court of Appeals, if allowed to stand, will seriously threaten the integrity of the collective bargaining process.

ARGUMENT

1. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court.

We first consider the law enunciated by this court in the case of *United Steelworkers of America vs. American Manufacturing Co.*, 363 U. S. 564, 4 L. Ed. 2nd 1403, 80 S. Ct. 1343; *United Steelworkers of America vs. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 4 L. Ed. 2nd 1409, 80 S. Ct. 1347; and *General Drivers, Warehousemen and Helpers, Local Union No. 89, et al., Petitioners, vs. Riss and Company, Inc.*, (no citation available), decided March 18, 1963, Law Week Volume No. 31, Page 4296, wherein this court held that when a collective bargaining agreement provides for resolution of disputes and grievances through a grievance procedure and arbitration, the courts have no jurisdiction to determine the merits of the controversy but are limited to compelling the parties to submit their differences to the forum agreed upon. If these decisions are applicable, then it is immaterial whether the contract is ambiguous or not — interpretation and/or enforcement are to be achieved through the grievance and arbitration process and not the court. The federal question, which this court has not settled, and which the Court of Appeals implicitly answered in the negative is:

Do the same principles apply where there is no dispute between the company and the union, but the disagreement is between two groups with conflicting interests within the union?

In this case, at least, we feel the answer must be "yes" for the following reasons:

(1) This collective bargaining agreement, by its terms, *requires* that *all* differences or misunderstandings be settled by regular grievance procedure and does not restrict the use of the grievance process to disputes between the union and the company (307a). On this point, the language of this contract is broader than the language of the contract under consideration in the *American Manufactur-*

ing Co. case, and very close to that of the contract involved in *Warrior & Gulf*. Can it not be said to be entirely possible that the parties, in making the contract, were entirely aware of the "therapeutic values" of grievance processing, referred to by this court in the *American Manufacturing Co.* case?

(2) The language of the court in *American Manufacturing* is as applicable to this situation, where the union is preventing resort to the grievance procedure, as in that case where American Manufacturing Co. was blocking its use. We quote:

> "* * * Section 203 (d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 U. S. C. Sec. 173 (d), states, 'Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement * * *.' That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given *full play* * * *. The collective agreement requires arbitration of claims that courts might be unwilling to entertain. In the context of the plant or industry the grievance may assume proportions of which judges are ignorant. Yet, the agreement is to submit *all* grievances to arbitration, not merely those that a court may deem to be meritorious. There is no exception in the "no strike" clause and none therefore should be read into the grievance clause, since one is the *quid pro quo* for the other. The question is not whether in the mind of the court there is equity in the claim. Arbitration is a stabilizing influence only as it serves as a vehicle for handling *any and all* disputes that arise under the agreement.
>
> "The collective agreement calls for the submission of grievances in the categories which it describes, irrespective of whether a court may deem them to be meritorious. In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think

special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve. See *Lewis v. Benedict Coal Corp.*, 361 U. S. 459, 468. The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. *It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.* Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

"The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware." *United Steelworkers of America vs. American Manufacturing Co.*, supra. (Italics added).

Further, this is not even a patently frivolous grievance. If the district court is right in its determination that the contract provides company seniority, plaintiffs are indeed entitled to have the union advance this claim in their behalf; if the Court of Appeals is correct in holding that the contract is ambiguous, then the grievance and arbitration procedures are the sole means for resolving the ambiguity.

(3) Both plaintiff and defendant agreed that the above cases were applicable and the relief granted by the district court, at the request of plaintiffs, is wholly consistent therewith. Indeed, defendants argued their applicability strenuously (Pages 38-40 of their brief to the Court of Appeals). Plaintiffs have at all times taken the position

that the legal problem has been how to compel the union to set the wheels in motion — which obviously they must do if the various steps of the grievance procedure are to be followed. Defendants' initial position was that the plaintiffs had no rights and, therefore, no grievance, by reason of the alleged custom and practice; when confronted with the rule that evidence may not be admitted to show custom and practice in the absence of an ambiguity in a written contract. they shifted their position to claim the existence of an ambiguity which, in turn, is an admission that there is an arbitrable issue under the contract and makes their refusal to file a grievance wholly arbitrary.

By the same token, if the Court of Appeals felt constrained to hold that the district court erred in finding the contract unambiguous, rather than providing grounds for dismissal, such a determination furnishes even stronger reason for upholding the judgment of the district court requiring the union to submit the issue to the grievance and arbitration procedure.

Petitioners recognize that the union may be honestly convinced that the plaintiffs are wrong but, in view of the contractual provisions, its statutory duty of representation, and the case law above cited, upon what ground does the union arrogate to itself the right to decide that only *some* differences and misunderstandings are to be presented? Does not its refusal to submit such a grievance frustrate the purpose collective bargaining agreements are meant to serve — i.e. the cause of industrial peace — just as much as any recalcitrance on the part of employers?

Turning the coin over, it is clear under this contract that resort cannot be had to the grievance and arbitration procedure without action on the part of the union. The only alternative to compelling the union to act, is the presentation and prosecution of the grievance directly by the individuals affected and the company. If such a process can lead to arbitration, which is extremely doubtful, it is not going to be the same arbitration that is contemplated by this contract. Bearing in mind that this is an industry-wide contract in the Detroit area, any such result would have widespread ramifications and conceivably could be more unsettling than a strike under similar circumstances.

For these reasons, we believe that this court should grant certiorari to consider the question of whether, under a collective bargaining agreement containing provisions for the resolution of grievances by a grievance and arbitration procedure, a union has the duty to invoke this process, at least where the complaint is not obviously groundless.

2. The Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this court.

This court has consistently held that a written collective bargaining agreement is one of the most important instruments for the stabilization of industrial relations. Thus, it has been said:

> **"It is conceded that although petitioner has reached an agreement with the Union concerning wages, hours and working conditions of the employees, it has nevertheless refused to sign any contract embodying the terms of the agreement. The Board supports its order directing petitioner, on request of the Union, to sign a written contract embodying the terms agreed upon on the ground, among others, that a refusal to sign is a refusal to bargain within the meaning of the Act.**
>
> **"In support of this contention it points to the history of the collective bargaining process showing that its object has long been an agreement between employer and employees as to wages, hours and working conditions evidenced by a signed contract or statement in writing, which serves both as recognition of the union with which the agreement is reached and as a permanent memorial of its terms. This experience has shown that refusal to sign a written contract has been a not infrequent means of frustrating the bargaining process through the refusal to recognize the labor organization as a party to it and the refusal to provide an authentic record of its terms which could be exhibited to employees, as evidence of the good faith of the employer. Such refusals have proved fruitful**

sources of dissatisfaction and disagreement. Contrasted with the unilateral statement by the employer of his labor policy, the signed agreement has been regarded as the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife.

"* * * A business man who entered into negotiations with another for an agreement having numerous provisions, with the reservation that he would not reduce it to writing or sign it, could hardly be thought to have bargained in good faith. This is even more so in the case of an employer who, by his refusal to honor, with his signature, the agreement which he has made with a labor organization, discredits the organization, impairs the bargaining process and tends to frustrate the aim of the statute to secure industrial peace through collective bargaining." *H. J. Heinz Co. vs. N. L. R. B.*, 311 U. S. 514, 523-524, 526; 61 S. Ct. 320, 325; 85 L. Ed. 309.

To the same effect, see *Consolidated Edison Co. et al vs. N. L. R. B., et al.*, 305 U. S. 197, 236, 237; 83 L. Ed. 126, 59 S. C. 206; *J. I. Case Co. vs. N. L. R. B.*, 321 U. S. 332, 64 S. C. 576, 88 L. Ed. 762; *Order of Railroad Telegraphers vs. Railway Express Agency, Inc.*, 321 U. S. 324, 346, 64 S. C. 582, 88 L. Ed. 788.

The judgment of the Court of Appeals is based almost entirely on an alleged custom and practice, all evidence of which was admitted over the objections of petitioners (47a, 49a). Whether the contract was ambiguous and such evidence therefore admissible will be discussed under Question No. 3, below. This discussion is proceeding on the assumption that the contract was not ambiguous on its face, inasmuch as the Court of Appeals held that, ambiguous or not, the union breached no duty by refusing to present plaintiffs' grievance and so dismissed the case.

It would seem clear that no purpose is served by requiring employers to enter into written agreements with unions if that agreement is not to be regarded as controlling of the employees' rights. Whatever utility custom and practice may have, when contracts between other

parties result in litigation, would seem to be wholly lacking in the case of union contracts. Foremost among the reasons for this statement is the fact that work forces change constantly and many employees would have no knowledge of the custom and practice. Unless the alleged ambiguity were obvious indeed, the average worker would not even be put on inquiry. The opinion of the Court of Appeals recites correspondence and events dating back to 1949; but a quick glance at the seniority lists (348a-358a) shows hirings all the way up to 1957. The mere existence of an alleged custom and practice is not sufficient to alter or affect a contract; it must also be open, certain and notorious. 55 *Am. Jur.*, Sec. 21, Usages and Customs, p. 282. This would almost never be true in the case of a collective bargaining agreement. Would persons hired after 1957 — and therefore not chargeable with knowledge of the alleged agreements that seniority was to be applied on a plant basis — have greater rights under this contract than persons employed since 1947? This would be a most peculiar result but it is the only one that can be logically arrived at as a result of defendants' claim that these agreements are controlling and not the language of the contract.

We emphatically do not make any claim that there was any chicanery involved in this situation; but much of the evidence advanced in support of the alleged agreements and practice was of a type easily manufactured. Under such circumstances, the value of many collective bargaining agreements may be precisely measured by what it costs to corrupt the necessary union officials. See *Lewis vs. Lowry*, 295 F. 2d 197, C. A. 4. The door should be kept tightly closed against any such possibility entering into industrial relations, and this can only be done by enforcing the principle previously announced by this court that union contracts are to be in writing so all may know their terms.

3. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

As this court said, in an early case,

> "It is a good general principle that written contracts ought to be expounded by themselves." *Graves vs. Barnwell and Boston Marine Ins. Co.*, 6 U. S. 419, 439, 2 Cranch 419, 439, 2 L. Ed. 324.

This principle has been applied, by a number of courts, specifically to collective bargaining agreements. To cite a few:

> "* * * We think that ordinarily the language of the contract as finally agreed upon must be construed by the courts in accordance with ordinary rules of construction without reference to the give and take of the bargaining sessions which produced the final terminology. Otherwise we would abandon completely the parol evidence rule when dealing with this type of contract * * *." *N. L. R. B. vs. Gulf Atlantic Warehouse Co.*, 291 F. 2d 475, 477: C. A. 5, 1961.

> "* * * As we have observed plaintiffs grounded their action on the collective bargaining agreement, which they averred was entered into for the benefit of plaintiffs and under which, they further averred, each employee may sue directly. Obviously, their rights are to be determined by their agreement * * *. As we said in In re Chicago & E. I. R. 'The intention of the parties must be found in the language used to express such intention; and if the court finds as a matter of law that the contract is unambiguous, evidence of the intention and acts of the parties plays no part in the decision.' Consequently, the rights and remedies of the parties are to be determined from the plain unambiguous words of the contract upon which suit is brought, unattended by averments of other intentions or contemplations. The unequivocal words of the agreement must speak for themselves * * *." *Anson vs. Hiram Walker & Sons*, 222 F. 2d 100, 103; C. A. 7, 1955.

"Plaintiff claims that the agreement should be liberally construed in his favor. The agreement clearly prescribes a condition precedent to vacation pay that the employee shall be on the seniority list on December 1, 1947, as well as having completed at least 6 months' work since December 1, 1946. The 2 conditions precedent are clearly stated and there is no doubtful meaning to be resolved in plaintiff's favor. We must apply the clear provisions of the agreement as we find them * * *."

Treloar vs. Steggeman, 333 Mich. 166, 170.

This position was again repeated as recently as September 23, 1961. At that time, the court said:

"We agree with the trial court's conclusion that:

"'This case and *Treloar* cannot be distinguished on the facts or the law.'

"The contract is not ambiguous and clearly states that to be entitled to vacation pay plaintiff and his assignors must be employees completing continuous service during the period of April to October. It is not disputed that plaintiff and his assignors did not meet this requirement." *Givhan vs. Federated Metals Div.*, 364 Mich. 370, 372.

The next issue is whether the District Court or the Court of Appeals was correct in making its determination as to the ambiguity of the contract.

This brings us to the question of whether the Court of Appeals was correct in ruling the contract ambiguous. We note it bases its conclusion on two points:

(1) The claim that the contract provided for a *single seniority list for checkers only*, thereby raising the necessary implication that there was to be more than one list for bottlers.

The answer to this is that it simply is not so. The contract provides for *two* lists for checkers — a list at plant No. 1 and a list at plant No. 3 (307a). If any inference is to be drawn as to the seniority of the *bottlers*, from this

provision relating to the seniority of checkers, it is exactly opposite that stated by the Court of Appeals.[1] So long as no claim is made that the express provision relating to the order of layoff of bottlers is ambiguous, there would seem to be no reason to refer to the provision relating to checkers for the purpose of creating an ambiguity. The defendants do not claim, and the Court of Appeals did not find, that there is any ambiguity in the provision relating to the order of layoff of bottlers.

(2) The Court of Appeals also points to the provision that the contract requires the company to post *a* seniority list, twice yearly, and to give a copy of *the* list to the union. It does not say there is any ambiguity in this language, on its face. As there were two plants, the court says the question arises as to whether the above means a list for each plant or a list covering both. But the fact of the existence of two plants is, in itself, evidence outside the contract and not to be resorted to unless the contract is patently ambiguous; and the same is to be said of the court's finding that, since two seniority lists were posted, this established plant seniority for purposes of layoff, or at least raised an ambiguity in other sections of the contract. But, if there is any such question, we suggest the answer is to be found in the contract itself — a step in construction to be taken before evidence of custom — in the section relating to shift seniority wherein seniority is defined as length of service with the employer (306a). The rule in this re-

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[1] The contract which was plaintiffs' Exhibit 1 provided for two lists. When an attempt was made to point out to the court that the contract provided for two lists for checkers but, nonetheless, they were integrated with Plant No. 1 when Plant No. 3 was closed, the defendants claimed the checkers' seniority was immaterial (43a). Later defendants claimed the contract did not contain the true provision relating to checkers and this had been "corrected" by an exchange of correspondence with the company (109a-111a). No claim was made that any one else knew of this "correction" which never appeared in the official contract which petitioners relied on, but the Court of Appeals apparently is referring to it in its holding that the contract provided for one list for checkers.

gard is that terms used in one section of a contract are presumed to have the same meaning when used in other sections of the same document, unless it is expressly so stated to the contrary. *Midland Valley R. R. vs. Railway Express*, 105 F. 2d 201, C.A. Oklahoma; *Gulf, M. & O. R. R. vs. Illinois Central R. R.*, 128 F. Supp. 311, D. C. Ala.

Finally, the provision relating to layoff is complete and separate in itself. We may not say it is modified by the practice under another paragraph, not necessarily connected with it, unless the contract clearly indicates this is intended without our making a new contract or adding terms not contained in the one made by the parties.

The purpose of these rules of construction is to decrease litigation by enabling attorneys to advise their clients of their rights. There is no reason to believe they would not serve the same function when labor contracts are under consideration.

Archibald Cox, former Royall Professor of Law, Harvard Law School, and now Solicitor General of the United States and well known as a writer on labor law, has sounded a warning against being too ready to say that, because of certain differences, ordinary contract principles do not apply to collective bargaining agreements. We quote:

> "The ease with which one can show that collective bargaining agreements have characteristics which preclude the application of some of the familiar principles of contracts and agency creates the danger that those who are knowledgeable about collective bargaining will demand that we discard all the precepts of contract law and create a new law of collective bargaining agreements. I have already expressed the view that the courts would ignore the plea but surely it is unwise even if they would sustain it. Many legal rules have hardened into conceptual doctrines which lawyers invoke with little thought for the underlying reasons, but the doctrines themselves represent an accumulation of tested wisdom, they are bottomed upon notions of fairness and sound public policy, and it would be a foolish waste to climb the ladder all over again just because the suggested principles were developed in other contexts and some of them are demon-

strably inapposite * * *." *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, Nov., 1958.

4. The decision of the Court of Appeals, if allowed to stand, will seriously threaten the integrity of the collective bargaining process.

It may be both overly obvious and tautological to say it, but the essence of collective bargaining is *group* action. While the process varies from union to union, the formulation of collective agreements frequently involves, as in this instance, the appointment of a contract committee, the drafting of demands, discussion of counter-demands and other reactions by the employer, negotiation, drafting of a final contract and ratification by the membership. The extent to which the membership actively participates and the degree of interest shown by it are apt to be rather good indices of the healthiness of the local union, and a fairly precise measure of how democratic it is.

No membership is going to long remain interested in its affairs, however, if all the work done by it in the formulation and negotiation of collective agreements can by undone by an exchange of letters between a business agent and the personnel manager. It is no answer to this to say that the letters were read to a membership meeting — if, indeed, they were. Once a contract is ratified, the membership normally expects it will remain in effect unless changed by reason of some extraordinary event occurring which was not in contemplation of the parties at the time of making the contract and as to which, by reason of its very nature, the membership has notice. This is also the policy of the law.

From reading the opinion of the Court of Appeals, many union officers would conclude that by making agreements with the company they could override the provisions of the collective bargaining agreement and this would be made binding upon the members by the simple expedient of advising whatever number showed up at the next membership meeting of the fact that this had been done. No special notice would be necessary and no ratification. The ultimate result would be the complete dispensing with col-

lective action, as such, and the concentration of power in the hands of one person. This has happened in some unions, with appalling results and a firm conviction on the part of many that it ought to be discouraged rather than encouraged.

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this court.

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APPENDIX A

APPENDIX A — OPINION OF THE COURT OF APPEALS

Decided December 31, 1962.

Before: McALLISTER, Circuit Judge, BOYD and TAYLOR, District Judges.

ROBERT L. TAYLOR, District Judge. Pekar, Rozell, Patterson, Audia, Gower and Schmantowsky, individually and in behalf of all other employees of Goebel Brewing Company who worked at Plant No. 3 of said Company prior to its closing, filed an action under the Declaratory Judgments Act, 28 U. S. C. 2201, and the National Labor Relations Act, 29 U. S. C. 157, against Local Unions No. 3, 38 and 181 of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO and the International Union of the brewery industry,[1] praying the Court to enforce their seniority rights under a collective bargaining agreement entered into between the brewers of Detroit, including Goebels and the Locals of the International Union of brewery workers.

Plaintiffs also sought a declaratory judgment determining their rights under the collective bargaining agreement and an injunction against the Unions from refusing to process their grievances with respect to their layoff, or in the alternative a restraining order against the Unions from failing and neglecting to negotiate another agreement with Goebel which will fairly reflect all the rights and claims of all employees to the remaining available jobs at Goebel Brewing Company.

The District Judge issued a declaratory judgment and ordered an injunction as prayed for in the complaint and this appeal followed.

The Company is not a party to the action.

Local No. 3 represents the brewing department employees and Local No. 38 represents the delivery and freight de-

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[1] Appellants will sometimes be referred to as Local Union and International Union, respectively, and appellees as plaintiffs and Goebel Brewing Company as the Company.

partment employees. The action was dismissed as to Locals 3 and 38 and an order entered against Local Union 181 and appellant International Union only.

Local 181 represents the bottling department employees and checkers.

The Company operated two plants. Prior to 1948, none of the breweries had more than one plant in Detroit. The Company in 1948 purchased a plant of Koppitch-Melchor Company which was a party to the collective bargaining agreement. This plant became known as Goebel's Plant No. 3 and the Company's other Detroit plant as Plant No. 1. They are about a mile and a half apart.

A number of Plant 1 bottling department employees were transferred to Plant 3 in 1948 and 1949. Those employees of Plant 1 who were transferred to Plant 3 were credited with their service with the Company and the former Koppitch-Melchor employees were also credited with their service with that Company for seniority purposes with Goebel. Seniority lists were posted and maintained at Plants 1 and 3 from the date of acquisition of Plant 3 by the Company.

The May 20, 1949 agreement was the first collective bargaining agreement negotiated following the acquisition of Plant 3. It provided that no permanent transfers might be made from one plant to another except on a voluntary basis. The provision applied only to Goebel as no other brewery operated two plants in Detroit. An additional provision required that a list of employees be arranged in the order of their seniority and that such list be posted in a conspicuous place on the premises of the employer and that, after the expiration of 90 days, no changes be made in the seniority list except those necessitated by termination of employment or the addition of employees. Separate lists were always posted in each of the plants without objection, although the contract used "list" in the singular.

The 1949 agreement provided further for strict adherence to seniority in laying off and rehiring, preference of shifts, division of overtime equally among regular employees, and choice of vacation periods in the respective

departments based on length of service with the employer. These provisions were always applied separately in each plant.

In December, 1949, negotiations between the Detroit breweries and the Local Unions were carried on concerning a supplemental agreement affecting Local 3, but the Company refused to sign the agreement without assurance that its two plants would continue to be treated separately for seniority purposes.

The Company's Labor Relations Counsel wrote a letter dated December 8, 1949 confirming the understanding of the parties that the contract required the Company to maintain two distinct seniority lists, one for each plant; and that the Company had no right to make transfers from one plant to another except to fill vacancies and no vacancy would be deemed to exist at one plant at any time that men with seniority at such plant were not working, and in making transfers from one plant to the other, the men selected would be taken from the bottom of the seniority list from which transfers were being made. This letter was read to the membership of the Local Union at the following membership meeting.

Seniority and other provisions of the 1949 contract were carried through succeeding contracts without material change, including the 1958 contract, except for the change that was made when the checkers were organized in October, 1950. The Union requested a single company-wide seniority system for the checkers.

An agreement was executed on October 23, 1950 setting out the condition of the Company's recognition of the Local as representative of the checkers. Section 4 thereof provided for one seniority list for both plants covering all checkers, but stated that it should in no way be used as an argument that one seniority list should be established for both plants to cover other employees represented by the bottlers, brewers, or drivers. The supplemental agreement of October 23, 1950 was reconfirmed and supplemented in May, 1951.

The October 22, 1956 contract provided again for one seniority list for both plants covering checkers. The provision as to checkers was incorporated in the 1958 agree-

ment and was the only specific reference therein to a company-wide seniority list. As a result, the checkers moved from one plant to another.

Only five bottlers moved from one plant to another between 1949 and 1955. These bottlers were moved to Plant 3 in June, 1954. Before moving, they were advised by the Company that there was no transfer of seniority between the two plants and each signed an acknowledgment of his loss of seniority in Plant 1 and went to the foot of the Plant 3 seniority list. No bottler in one plant ever bumped an employee with lesser seniority in the other plant out of a job, or attempted to do so. Plant 3 was shut down for a period of eighteen months commencing in December, 1955, but none of the Plant 3 employees bumped any of the employees in Plant 1 who had less seniority.

Prior to the December, 1955 shutdown, seniority rights of the Plant 3 employees had been discussed at Union meetings. The minutes of the Local Executive Board and shop stewards, including representatives from Plants 1 and 3, held on October 23, 1955, show that it was noted that only the checkers seniority list was company-wide. The minutes were read and accepted by the Local Union on November 6, 1955.

At a regular Executive Board meeting of the Local on December 5, 1955, certain of the Plant 3 representatives discussed with the Board the manner of handling the problems that would arise when Plant 3 was closed. The minutes of the meeting disclosed that it was the consensus of the Plant 3 employees that when employees were hired at Plant 1, the job should be filled by starting from the top of the seniority list of Plant 3.

At the January 3, 1956 meeting of the Local Executive Board, after Plant 3 had closed, a question was raised concerning the application of the contract provision granting superseniority to officers and shop stewards. The minutes show that a motion was adopted that an officer who was a Plant 3 employee should be permitted to exercise his top seniority as an officer of the Union and that he be the first sent to the next job opening at Plant 1; but that because of the dual seniority list, he would be placed at the

bottom of the seniority list at Plant 1. The minutes were read and accepted at the January 8, 1956 membership meeting.

On January 20, 1956, in response to a request from the business agent of the Local, the General Counsel of the International gave a legal opinion concerning the seniority rights of the Plant 3 bottlers. He stated that Plant 3 employees could not assert their seniority in Plant 1 if Plant 3 should be permanently closed. He suggested that arbitration be considered. The Local Executive Board decided that arbitration was not required inasmuch as the Company and the Union were in agreement that the contract provided for plant-wide seniority rather than company-wide seniority.

On February 2, 1956, the General Counsel of the International gave another opinion reaffirming his January 20, 1956 view that seniority rights were plant-wide rather than company-wide. This opinion was read at a regular membership meeting on February 5, 1956, in which the membership concurred.

On February 26, 1956, John Audia communicated with the International on behalf of the Plant 3 bottlers who had previously worked in Plant 1, claiming the right to exercise their seniority in Plant 1, and requested consideration of their problem. No rights were claimed for Plant 3 employees who had not previously worked in Plant 1. The President of the International treated the communication as an appeal and wrote the Local Union. The President concurred in the opinion of the International General Counsel that seniority of the employees was plant-wide and not company-wide. Many of the Plant 3 bottlers who were laid off as a result of the December 15, 1955 shutdown obtained employment in Plant 1, but went to the bottom of the seniority list in that plant as of the date of their employment.

On March 4, 1956, the appeal of the Plant 3 employees to the International was discussed at a membership meeting and it was noted that the membership had previously concurred in the legal opinion received from International Counsel.

The Local Executive Board again considered a problem with respect to seniority rights of Plant 3 employees on August 6, 1956 and reaffirmed its previous decision that the seniority date of a Local Union officer from Plant 3 who was hired in Plant 1 was his date of hire in Plant 1.

The Plant 3 employees during the shutdown from 1955 to 1957 consulted a lawyer about starting suit to establish their claim to company-wide seniority rights. The matter was not pursued because of rumors that Plant 3 was shortly to reopen.

In May, 1957, the Company and Union representatives met to agree upon the procedure for the recall of the Plant 3 employees. It was agreed that Plant 3 employees would be given at least seven days' notice of recall and that those who were working in Plant 1 would have the option of remaining in Plant 1 and utilizing their Plant 3 seniority or returning to Plant 3 and utilizing their Plant 1 seniority.

The Company sent a letter and questionnaire to all Plant 3 bottle shop employees on May 7, 1957 informing them of its intention to reopen Plant 3 and advising them of the principles agreed upon governing their recall. They were advised that employees on the Plant 3 seniority list then working at Plant 1 would be given the opportunity to elect whether to remain at Plant 1 or return to Plant 3. If they elected to remain at Plant 1, they would be dropped from the seniority list at Plant 3. If they elected to return to Plant 3, and should be laid off for a period of 10 successive working days at that plant at any time prior to January 1, 1958, they would have the right to return to Plant 1 with the same seniority that they had at the date they transferred to Plant 3, plus such additional seniority as they may have acquired at Plant 3 after the reopening. It was specifically pointed out that an election to return to Plant 1 at that time would result in their being dropped from the Plant 3 seniority list. It was also pointed out that the Company was not in a position to assure them that Plant 3 would be continued in operation for any specified time; that the question would be determined by Management in the light of future business conditions.

Each of the plaintiffs received the letter and questionnaire and they elected to return to Plant 3 under the

conditions set forth in the May 7, 1957 letter and questionnaire. Plant 3 had been modernized during the shutdown and it was the view of the men that Plant 3 would remain open permanently.

The seniority provisions of the various contracts which had been made prior to 1958 were identical to those incorporated in the 1958 contract. Those provisions had been interpreted over the years by the Union and the Company as being plant-wide as distinguished from company-wide and the membership of the Union, including all of the plaintiffs, were familiar with those interpretations.

In November, 1957, the Local Union's Contract Committee began a series of meetings for the purpose of considering contract changes to be submitted to the Company in the forthcoming negotiations as the bargaining agreement then in effect was due to expire in April, 1958. All the plants in Detroit were represented on the Contract Committee. Patterson represented Plant 3.

At the first meeting of the Contract Committee, the question was raised, whether Goebel employees desired to change the seniority provisions of the contract to provide for company, rather than plant, seniority. The representative of Plant 3 was told that if the employees of Plant 3 wanted to change the seniority provisions that then was the time to try to get it into the contract. It was suggested that a vote of the employees at Plant 1 and Plant 3 be taken as to whether they wanted plant or company seniority. Patterson took up the question of a vote with the members at Plant 3. At a meeting of the group on January 25, 1958, it was decided that a vote would not be fair as there were over 200 employees at Plant 1 and only 80 employees at Plant 3 and that since separate seniority lists had been in practice for ten years, the matter should not be changed.

On October 10, 1958, the Company announced to its employees that it intended to suspend operations at Plant 3. At the same time, there were about 40 Plant 1 employees with seniority rights who were laid off. The number of laid-off Plant 1 employees increased during the winter to a total of 20% to 25% of the Plant 1 working force of about 230.

On June 23, 1960, the Company advised the employees that Plant 3 had been sold and that they were terminated.

Plant 3 bottlers submitted a statement to the Local Executive Board on January 5, 1959 asking the Board to see that they were given the right to replace men with less seniority at Plant 1. In the statement, they stated that they had checked the collective bargaining agreement, but could find nothing in it stating that they had either company or plant seniority. The statement recited that the Company recognized total company service for the purpose of computing vacation periods; that the employees who transferred from Plant 1 to Plant 3 in 1948 and 1949 carried seniority with them; and, the checkers had a company-wide seniority system and the dockmen who were represented by Local 38 also had interplant rights. The Local Executive Board advised Plant 3 employees that it could not grant their request without violating the contract.

The representatives of the Plant 3 bottlers then filed an appeal with the International President. The appeal presented 10 points relied upon by the Plant 3 employees and repeatedly stated that the contract did not define the nature of the seniority of the Goebel employees. The International President requested a statement from the Local of its position in the matter. A statement from the Local was received, a copy of which was sent to the appealing members.

The International President advised the appealing members on February 4, 1959 that the Local Union had correctly interpreted the contract and that there was no reason for the International to interfere. It was pointed out that the 1958 contract was entered into with full knowledge that previous contracts had been construed to apply on a plant-wide basis rather than company-wide basis with respect to seniority rights.

Plaintiffs presented a grievance to the Company in the Spring of 1959 and were granted a hearing. The Company took the position that through the years there were two separate seniority lists and there was no way to help the employees in Plant 3 because the contract had always

been interpreted as providing employees seniority on a plant-wide basis.

• • •

The District Judge found: That Plant 1 and Plant 3 each had its own seniority list and status and that the employees of each plant had plant-wide rather than company-wide seniority for layoff and rehiring or recall purposes; that seniority lists were posted at Plant 3 and Plant 1 and that the employees on one list could not bump employees for job preference on the other list with the result that in transferring from one plant to the other in either direction, an employee did not carry his seniority to his transferred status, but went to the bottom of the seniority list at the time of such transfer; that checkers had company-wide seniority with Goebel by virtue of special contract agreements; that in October, 1958, the employees at Plant 3 were told that the Company was going to terminate production at that plant and that on that day employees of Plant 3 were told that they could not go to Plant 1 for work even though there were employees of Plant 1 with less seniority than some of the men being laid off at Plant 3; that Plant 3 employees submitted their seniority grievance to Local 181 but obtained no relief, then to the International with the same result; that during the year 1955, when Plant 3 had been shut down for an extended period of time, there was a discussion about seniority with Local Union 181, as to whether the employees at Plant 3 were invested with plant-wide seniority or company-wide seniority; that during this layoff, employees from Plant 3 went to work at Plant 1, but were placed, under protest, at the bottom of the seniority list at Plant 1; that when Plant 3 was reopened, the employees of that plant who were working at Plant 1 were asked if they wanted to remain at Plant 1 or return to Plant 3; that since Plant 3 was modernized during the shutdown, they felt that it would remain open permanently, so they returned to Plant 3 and assumed their Plant 3 seniority; that Section 11 of the 1958 agreement provides that employees shall have preference of shift in accordance with their seniority, but the preference was granted separately in each plant with the result that an employee in

Plant 3 could not avail himself of this preference in Plant 1; that the converse was also true.

He further found: That after the layoff in 1955, while Plant 3 was being modernized, the seniority status of the members of Local 181 employed at Plant 3 became a matter of concern and controversy within the Union; that a legal opinion from the General Counsel of the International was forwarded to Mr. Peter Hann, Business Representative and Corresponding Secretary of Local 181, regarding the question of seniority rights of members of Local 181 at Plant 3; that the General Counsel advised that it had never been the intention of the Company or the Union to establish company-wide seniority; that a laid-off employee had no right to bump employees with less seniority at Plant 1 and that the same would be true of an employee of Plant 1 attempting to bump an employee of Plant 3; that he further advised that since seniority was on a plant-to-plant basis a Plant 3 employee who would transfer to Plant 1 would go to the bottom of the seniority list, and the same would be true of a Plant 1 employee transferring to Plant 3; that this opinion was submitted to the general membership of the Local at a meeting held on February 5, 1956 and was discussed by the members and approved.

The Court further found: That in relation to the negotiation of the 1958 agreement, the first meeting of the Contract Proposal Committee was held during the fall of 1957, at which time the seniority rights of the employees of the two Goebel plants were discussed pro and con; that at another meeting of the Contract Committee held on January 25, 1958, the problem of one or two seniority lists of Plants 1 and 3 of Goebel was again brought up and discussed and it was determined that it should be left as is because a vote at that time would not be fair to all concerned since there were over 200 employees at Plant 1 and 80 employees at Plant 3, and that inasmuch as separate seniority lists had been in practice for the past ten years, it was better for the contract to remain unchanged.

He found finally that the proposals agreed upon by the Contract Committee were submitted to the general membership of Local 181 for ratification, then to the Joint Executive Board for endorsement and then to the International

Union for its attention; that at the time that proposals were being submitted and considered, it was a matter of common knowledge of the officials of Local 181 that the Plant 3 employees were contending that there was company-wide seniority; that Local 181 never asked or considered asking the Company to do anything about the seniority rights of its employees; that the Local's position was that the employees of Plant 3 had no seniority rights at Plant 1, and that the Local further felt that it was not its duty to try to reopen the contract to change the seniority rights of the respective parties.

In its conclusions of law, the Court stated that the distinction between plant-wide and company-wide seniority was not spelled out in the agreement of May 22, 1958, but that this fact did not indicate the existence of an ambiguity; that the language in the agreement in its entirety relating to seniority permitted no other interpretation than that of company-wide seniority; that defendants pointed to no provision clearly construable as referring to plant-wide seniority and that the implications to be drawn from the language of the contracts were entirely consistent with company-wide seniority.

The Court further concluded that whether or not defendants deliberately discriminated against, or intended to discriminate against, the plaintiffs was immaterial for purposes of the resultant effect upon plaintiffs; that defendants breached their duty of fair representation which resulted in a type of injury to plaintiffs against which they were entitled to have been protected by virtue of the terms of the bargaining agreement; that the fact that the plaintiffs made no complaints prior to 1955 is no reason for their having been precluded from attempting to assert the rights to which they were entitled under the bargaining agreement; that the various situations which arose in relation to seniority rights were of such a nature that it would have served no practical purpose for plaintiffs to have raised the issue of company-wide seniority versus plant-wide seniority and that their non-insistence did not waive or release their contract right to company-wide seniority, and further that there was no intention upon the part of plaintiffs to do so.

The District Court concluded finally that discrimination was practiced upon plaintiffs by defendants, regardless of intent on the part of the defendants; that they have suffered ultimate discrimination just as much by the allegedly good intentions of the defendants as they would have had the defendants acted willfully and maliciously; that plaintiffs had a right, and a continuing one, to rely upon the terms of the agreement since there was no valid modification of said agreement with respect to issues here raised, plaintiffs were entitled to recognition of company-wide seniority; that the contract, being clear, reliance upon acts and conduct in construction thereof is unnecessary and improper.

The District Judge noted that the contract provided that "No verbal understanding or representations of any nature that would change the meaning of any section of this Agreement will be recognized or considered valid and no Union representative or Employer representative shall have the authority to change any provisions of this Agreement."

The question of damages was reserved for the taking of testimony, or making an order of reference to a special master, to determine the amount of damages suffered by plaintiffs following the disposition of all other issues in the action.

* * *

Plaintiffs contend that the 1958 contract is unambiguous and that its pertinent provisions show that seniority was company-wide as held by the District Judge. They pointed out that Section 4 classifies employees as probationary, temporary and regular, and that Section 6(b) provides that all probationary employees shall be laid off first, all temporary employees shall then be laid off in accordance with their seniority, and, when a 40-hour work week cannot be given to all regular employees, the regular employees shall then be laid off according to their seniority, the last regular employee to be the first laid off, and so on in order; and that the contract is silent, whether the layoffs are to be carried out on a single plant or a company-wide basis.

Section 6(b) (5) provides that there shall be a seniority list for Stroh checkers and a seniority list for Goebel checkers at Plant 1 and at Plant 3 that shall be strictly used to determine layoffs and recalls in the Checking Department *only*. Reading 6(b) (4) and 6(b) (5) together, it appears that the parties took pains to make it clear that the single seniority list of checkers was to control the layoffs of checkers in both plants on a company-wide basis. The fact that it was specifically stated that this provision was to apply to checkers only would indicate that the single seniority list would not apply to bottlers and other employees. We think there is an ambiguity in Sections 6(b) (4) and (5).

Section 11 provides that employees shall have preference of shift in the order of their seniority. It is argued that in order to sustain the claim of seniority on a plant-wide basis that it would be necessary to read the word "all" out of Section 6(b) of the contract, and to eliminate the definition of seniority in Section 11.

It is contended that the understandings, agreements and customs of the Union and the Company from 1948 until 1958 do not change the 1958 agreement because such understandings and agreements were not negotiated and ratified in accordance with the requirements of Union procedure and were superseded by the agreement of May 22, 1958.

As previously indicated, we do not share the view of plaintiffs as to the certainty of the meaning of the seniority provisions in the contract. Even plaintiffs, in submitting their grievance to the Local Union were not sure of the contract meaning with respect to seniority. In the statement of their grievance they say: "We have checked the contract very carefully and can find nothing stating that we have either Company or Plant seniority."

In their appeal to the International Union, they repeated that neither they nor the Local Executive Board could find anything in the contract stating that they had either company or plant seniority, and further stated that "the type of seniority that we have is not defined in the contract."

Similar doubts as to the meaning of the contract are created by the comparison of Section 6(b) (5) and Sec-

tion 6(d), the latter section providing that a *list* of employees arranged in their order of seniority shall be revised and posted March 1 and September 1 of each year and a copy of the *seniority list* shall be furnished the Local Union. The question arises, whether the word "list" applies to each plant or to one plant. The Company and Local Union construed it to mean a list for each plant.

The record shows clearly that except for the checkers, each plant has had a separate seniority list since 1949, which it has used in determining layoffs, recalls, shift preference, vacation preference and division of overtime, and that no employee of one plant has been permitted to exercise his seniority to bump an employee in the other plant. Where past practice has established a meaning for language that is used by the parties in a new agreement, the language will be presumed to have the meaning given it by such past practice. Werne, *Law and Practice of the Labor Contract*, Vol. 1, pp. 195, 196.

The contract must be construed to give effect to the intent of the parties when it was made and the circumstances existing at the time it was made should be looked to to ascertain the intent. *Sobczak vs. Kotwicki*, 347 Mich. 242, 249 (1956).

When parties by their uniform conduct over a period of time have given a contract a particular construction, such construction will be adopted by the courts. *Chesapeake & Ohio Railway Co. vs. Michigan Public Service Commission*, 347 Mich. 234, 240.

"The construction of a contract which the parties have given it while operating thereunder, should be followed." *Franklin Fire Ins. Co. vs. Chesapeake & Ohio Railway Co.*, 140 F. 2d 898, 899 (C. A. 6).

Plaintiffs are residents of Michigan and were employed there, and the collective bargaining agreement was made in Michigan. This Court has held under like circumstances that the law of Michigan is important, if not indeed controlling. *Union News Co. vs. Hildreth*, 295 F. 2d 658, 663. In the same case, the Court quoted with approval the language of the Michigan Supreme Court in the case of *Cortez vs. Ford Motor Company*, 349 Mich. 108, as follows:

> " 'Our Court has repeatedly held that proper exercise of such discretion over grievances and interpretation of contract terms in the interest of all its members is vested in authorized representatives of the Union, subject to challenge after exhaustion of the grievance procedure only on grounds of bad faith, arbitrary action or fraud.' 349 Mich. 108, at page 121."

Defendants owed plaintiffs the duty to exercise fairly the power conferred upon them under the National Labor Relations Act without hostile discrimination. If they exercise that power in good faith, which would mean free from hostile discrimination, they would not be liable for a mistake in interpreting the bargaining contract.

In the case of *Ford Motor Company vs. Huffman*, 345 U. S. 330, 338, relied upon by plaintiffs to support their contention, the Court said:

> "The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

Another case relied upon by plaintiffs is that of *Syres vs. Oil Workers International Union*, 350 U. S. 892, reversing 223 F. 2d 739 (C. A. 5). That case involved representative action by members of a local negro union against representatives of a local white union to obtain judgment declaring void bargaining agreement which provided for two lines of seniority based upon race. The case involved hostile discrimination upon the part of the bargaining agent and is differentiated on its facts from our case.

If the contract provides for company-wide seniority when properly interpreted, was the duty of fair representation violated by the Local and International Unions in misinterpreting the contract and in failure to arbitrate plaintiffs' seniority problem with the Company? Plaintiffs contend that the Unions acted in bad faith, arbitrarily and fraudulently. As evidence of bad faith, they rely on the

letters of the International to the Local in connection with the dispute over the 1955 layoff. In the first letter dated January 20, 1956, the International pointed out that the various provisions governing seniority were drawn as though they applied on a company-wide basis rather than a plant-wide basis and suggested arbitration of the dispute. The second letter dated February 2, 1956 contained no reference to the language of the contract. It was devoted to defending the Local's position that the employees had plant and not company-wide seniority. It is argued that the letters are significant because the letter of February 2, 1956 was the only one read to the membership by Hann, the Business Agent. The International based its refusal to represent plaintiffs following the 1958 layoff upon the previous decision with reference to seniority rights first made in connection with the 1955 layoff and announced in these letters.

It is argued by plaintiffs that the contract provides for the order of layoff in clear terms and the Unions arbitrarily failed to follow the terms of the contract. On the question of fraud, plaintiffs contend that defendants placed reliance on a series of memorandums and letters between the Local and the Company, both oral and written, to establish plant seniority. It is contended that none of the understandings found in the memorandums and letters were reached pursuant to the requirements of the Union constitution and are void by the terms of the Union constitution and the terms of the negotiated contracts; that no explanation is offered as to why the so-called understandings were not incorporated into the collective bargaining agreements made subsequent thereto; and that since the understandings were not divulged to the Union members, a deceit was practiced upon them by the Company and the Union. They further argue that correspondence between the Union and the Company was not brought to the knowledge of the Union members and defendants should have insisted upon the inclusion of provisions for plant seniority during the 1958 negotiations if they felt they owed the Company any duty in that respect. Plaintiffs argue that a secret agreement between the Union and the Company as to the terms of the agreement was a fraud upon its members, and that the

defendants are asking the Court to hold that they have discharged their duty of fair representation by nullifying the express provisions of the contract.

In our case, the District Court did not find that the defendants acted arbitrarily or with bias, or in bad faith or with hostile discrimination. The bill of complaint charged that the defendants failed to represent plaintiffs fairly and equally and showed partiality and favoritism towards those persons who are still employed by the Company.

The District Court concluded that whether the defendants deliberately discriminated against or intended to discriminate against plaintiffs was immaterial to the resultant effect upon plaintiffs and that there was a breach of duty of fair representation which resulted in injuries to plaintiffs.

Defendants construed the contract in the same manner that it had been construed by the Company and by the Local Union for a period of some nine or ten years and the language in the 1958 contract with respect to seniority was identical with that in the preceding contracts over the entire period of time.

The case of *Trotter vs. Amalgamated Association of Street Electric Railway, etc., et al.*, decided November 9, 1962, by this Court in an opinion by Judge Shackelford Miller, involved a question of seniority similar to the one involved in our case. In that case, the Court said:

> "Appellants rely strongly upon *Steele vs. L. & N. R. Co.*, 323 U. S. 192, *Tunstall vs. Brotherhood*, 323 U. S. 210, *Mount vs. Grand International Brotherhood of Loc. Eng.*, 226 F. (2) 604, C. A. 6th, cert. denied, 350 U. S. 967, and *Hargrove vs. Brotherhood of Locomotive Engineers*, 116 F. Supp. 3, D. C. These cases are examples of the now well settled rule that the bargaining representative of employees has the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against any employee or group of employees. Whether the bargaining representative has

acted fairly and impartially and without hostile discrimination *depends upon the facts of each case* . . . ." (Emphasis added).

The Court concluded that there was no hostile discrimination.

Although the facts in that case were not the same as those now before us, the rationale of the decision supports our conclusion. The facts which we have recounted and the findings of the District Court which we have reviewed indicate to us that throughout the ten-year history of this contract, the actions of the Union were governed by candidness in its dealings with its members. There was a recognition of the possible conflict between the members of the Union in the two plants and Union officers more than once endeavored to have the matter resolved prior to negotiations with the Company. The record is clear that the plaintiffs to this lawsuit were well aware of the difficulty and that they declined to bring the matter to a vote within the Union because they felt they would lose in a contest with the members of the other plant. Under these facts, we do not see how the Union either deceived its members or favored one group over another. In our opinion, in their bargaining negotiations with the Company, the facts show that the defendants acted fairly and impartially and with no hostile discrimination toward the plaintiffs and those whom they represent in this lawsuit.

It results that the decision of the District Judge must be reversed and the case dismissed.

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No. 963

In the

Supreme Court of the United States

October Term, 1962

GEORGE PEKAR, JOSEPH ROZELL, EDWARD PATTERSON, JOHN AUDIA, MELVIN GOWER and ROBERT SCHMANTOWSKY, individually and in behalf of all other employees of Goebel Brewing Company who worked at Plant No. 3 of said Company prior to the closing thereof,

Petitioners,

vs.

LOCAL UNION NO. 181 of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO

and

INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, AFL-CIO,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents, Local Union No. 181 and the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, respectfully re-

quest that this Honorable Court refuse to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on December 31, 1962.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The record in this case does not warrant the Questions Presented as set out on page 2 of the Petition. The essential question is: Does a union breach its duty of fair representation when it refuses to take an employee seniority grievance to arbitration when (1) the union and the company, both acting in complete good faith, agree that the grievance has no merit, (2) the position of the Union and the compar , is based upon ten years of mutually-agreed construction of the seniority provisions, (3) this construction of the seniority provisions has repeatedly been reported to and concurred in by the union membership, (4) the collective agreement upon which this action is predicated was negotiated with full knowledge on the part of the union, its members (including the Petitioners) and the company of the historical interpretation of the seniority provisions, and (5) the agreement provides that "All differences and misunderstandings which may arise shall be settled between the Employer and the Local Union by regular grievance procedure, *and if no adjustment satisfactory to both parties can be reached in this way*", by arbitration?

ADDITIONAL STATEMENT OF THE CASE

The abbreviated statement of facts set out in the Petition (pp. 3-7), while correct, with one important exception which is discussed below, hardly does justice to the case. The facts are dealt with in great detail in the opinion of the Court of Appeals (Petition App. pp. 1a-9a).

The important inaccuracy in the Petitioners' Statement is in its quotation of Section 6(b)(5) of the collective agreement (Petition, p. 5), which pertains to the checkers' seniority list. As found by the Trial Court (App. 31a), this provision should read:

> "There shall be a seniority list for Stroh checkers and a seniority list for Goebel checkers for plant 1 and plant 3 that shall be strictly used to determine layoffs and recalls in the checking department only."

The importance of this provision lies in the fact that the Court of Appeals found, we think properly, that its presence in the collective agreement created an ambiguity in the meaning of the seniority provisions governing the Petitioners, who were bottlers. Said the Court of Appeals (Petition App. p. 13a):

> "Section 6 (b) (5) provides that there shall be a seniority list for Stroh checkers and a seniority list for Goebel checkers at Plant 1 and at Plant 3 that shall be strictly used to determine layoffs and recalls in the Checking Department only. Reading 6 (b) (4) and 6 (b) (5) together, it appears that the parties took pains to make it clear that the single seniority list of checkers was to control the layoffs of checkers in both plants on a company-wide basis. The fact that it was specifically stated that this provision was to apply to checkers only would indicate that the single seniority list would not apply to bottlers and other employees. We think there is an ambiguity in Sections 6 (b) (4) and (5)."

It is not claimed, nor did the District Court find, that the Respondents acted arbitrarily or out of bias, bad faith or hostile discrimination against Petitioners. The Court of Appeals found affirmatively that the actions of Respondents were at all times "governed by candidness in its dealings with its members", that they did not favor one group over

the other, and that they acted "fairly, impartially and with no hostile discrimination" (Petition App. p. 18a).

REASONS FOR DENYING THE WRIT

1. The Court of Appeals did not err in overruling the judgment of the District Court. The material facts are undisputed and they establish the Respondents' good faith, impartiality, objectivity and reasonableness in rejecting Petitioners' grievance. Upon such facts, an action for breach of the duty of fair representation cannot be sustained.

In *Ford Motor Company* v. *Huffman*, 345 U.S. 330 (1953), the basic rule was stated as follows:

> "Their statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all those members, without hostility to any."

See also *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U.S. 192, 202-3 (1944). Professor (now Solicitor General) Archibald Cox summed up the law on this subject in *Individual Enforcement of Collective Agreements*, 8 Labor Law Journal, 850, at p. 858, as follows:

> "Nearly all the courts in which the issue has been raised have held that both the bargaining representative's decision not to press an individual's grievance and also a settlement between the representative and the employer preclude an individual action in the absence of fraud and caprice."

None of the cases holding that the union has an enforceable duty to represent employees fairly and without discrimination implies that the courts have broad powers to review decisions taken by unions in the exercise of those powers. Relief has been granted only in cases involving

the most blatant and undeniable kinds of discrimination, usually, racial discrimination. As was stated in the *Huffman* case, *supra*, at p. 337:

> "The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

Therefore, when an employee alleges a breach of the Union's duty of fair representation, the test to be applied is whether the action of the Union was within "a wide range of reasonableness" and was taken "in good faith and honesty of purpose." The test is *not* whether the Union correctly interpreted the contract in accordance with the technical legal rules of contract interpretation. While such a test might apply in an action in contract, it has no place in an action for breach of the statutory duty of fair representation.

The following, from the opinion of Judge Medina in *Cunningham* v. *Erie Railroad Company*, 266 F. 2d 411 (2d Cir. 1959), is directly applicable:

> "As we have already indicated, in order to establish a breach by the union of its duty to represent the employees fairly, as the bargaining representative of the employees sanctioned by statute, *it is not enough to prove that the union was wrong in demanding Cunningham's dismissal.* This duty was no more than to forbear from 'hostile discrimination'. The arbitrariness shown must be of the bad faith kind. As Justice Stone suggested in *Steele*, 323 U.S. at page 203, it is not violative of federal law that the union not satisfy all employees or that it improperly balance the rights and obligations of the various groups it represents. *Something akin to factual malice is necessary.*" (Italics supplied.)

As Professor (now Solicitor General) Cox stated in *69 Harvard Law Review*, 601 at page 622:

> "All this suggests that the bargaining rights of the majority representatives are as broad *in the administration of a collective agreement as in its negotiation.*" (Italics supplied.)

This being the case, there clearly was no breach of the duty of fair representation in this case.

2. Petitioners contend — contrary to their position in the courts below — that the contract requires that it be interpreted through arbitration and not by a court. This is a complete reversal of position by Petitioners. Their Bill of Complaint specifically prayed that the District Court "render and issue a declaratory judgment defining and determining Plaintiffs' rights in the premises". In the Court of Appeals the defendants (Respondents here) challenged the Trial Court's right to interpret the seniority provisions of the contract. The position of the Plaintiffs (Petitioners here) was stated as follows on page 21 of their brief in the Court of Appeals:

> "The foregoing does not ignore the defendants' contention that the trial court had 'no right' to interpret the contract. The plaintiffs assert that they had certain rights under the contract which the defendants refused to enforce and, by so doing, breached their duty of representation. It is impossible to determine whether they had such rights without considering the provisions of the contract and, clearly, this court is concerned with the validity of the trial court's determination. With all due respect for the right of the company and the union to have differences between them resolved by arbitration and the case law upholding this right, this is not the question presently before us, even though interpretation of the contract is incidentally involved. None of the cases involving the union's duty of fair representation would have arisen

> had not the union and the company been in basic agreement, the issue in each case being whether the union was correct in assuming a posture conformably to that taken by the company."

Thus, Petitioners defended the right of the Trial Court to interpret the contract in order to determine whether Respondents had breached their duty of fair representation, but now claim the Court of Appeals did not have the same right – unless, presumably, it agreed with the Trial Court's interpretation.

3. The grievance and arbitration provisions clearly do not contemplate resort to arbitration when the union and the company are in agreement. Indeed, Section 1(a) of Article VIII of the agreement (quoted in full on page 6 of the Petition) specifically provides that differences or disputes shall be submitted to arbitration only "if no adjustment satisfactory to both parties can be reached" through the grievance procedure. The context leaves no doubt that "both parties" means the Employer and the Local Union. In the instant case there was no dispute whatever between the parties.

In referring to the "therapeutic values" of grievance processing in *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, this court emphasized the importance of giving effect to the "method agreed upon by the parties" for the settlement of disputes. It did not suggest that there is any therapeutic value in requiring the arbitration of disputes when no dispute exists between the parties to the agreement and their contract contemplates that only such disputes be arbitrated. To require the union to arbitrate whenever an individual employee disagrees with the interpretation of the contract which is mutually shared by the union and the employer would result in chaos in the administration of collective

agreements and would seriously undermine the status and responsibility of the collective bargaining representative.

4. The relief requested and granted by the District Court is wholly inconsistent with Petitioners' present position. The District Court rendered a declaratory judgment upholding the seniority rights claimed by Petitioners, and it enjoined the Defendants to enforce those rights "by all legal means and methods". Contrary to Petitioners' contention (Petition, p. 12), the District Court did not direct the Defendants to arbitrate in order to ascertain whether Plaintiffs had the seniority rights which they claimed, but directed the Defendants to enforce Plaintiffs' seniority rights "as hereinabove declared and set forth" (App. 35a). Petitioners, who would uphold the judgment of the District Court, are hardly in a position to argue that their seniority rights may be determined only through arbitration.

5. The decision of the Court of Appeals is soundly based upon the decisions of this Court in *Ford Motor Company* v. *Huffman, supra, Steele* v. *Louisville & Nashville R. R. Co., supra,* and upon holdings of the Circuit Courts of Appeals in cases involving the duty of fair representation, such as *Cunningham* v. *Erie Railroad Company, supra,* and *Ostrofsky* v. *United Steelworkers of America,* 171 F. Supp. 782, aff'd 273 F. 2d 414 (4th Cir. 1960).

6. There were a number of other serious infirmities in the judgment of the District Court which defendants raised on appeal but which the Court of Appeals did not reach, namely: (1) that the company had not been made a party defendant, (2) that the injunction order was void because of vagueness and indefiniteness, (3) that the International Union should in no event be held liable, (4) that jurisdiction over the subject matter was vested exclusively in the National Labor Relations Board, (5) that the action was barred by the statute of limitations or by laches, and (6) that the pendency of a state court action involving the same subject matter required dismissal of the complaint.

CONCLUSION

The Court of Appeals decision reversed the District Court on both the facts and the law, although the facts, even as found by the District Court, required dismissal of the complaint. The decision of the Court of Appeals is eminently and obviously correct. Any other conclusion would have been unconscionable. Petitioners' present position is a complete reversal of the one they took at all prior stages of this case. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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